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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and
UNITED TRANSPORTATION UNION,
Petitioners,

v.

THE ATCHISON, TOPEKA AND SANTA FE
RAILROAD COMPANY, *et al.*,

and

FEDERICO PENA, *et al.*,
Respondents.

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether compulsory time spent waiting by a train crew for deadhead transportation is "on-duty time" under the Hours of Service Act.

LIST OF PARTIES

The following parties appeared before the Court of Appeals:

Petitioners:

Brotherhood of Locomotive Engineers and
United Transportation Union

Respondents:

The Atchison, Topeka and Santa Fe Railroad Company,
Burlington Northern Railroad Company,
Consolidated Rail Corporation,
CSX Transportation, Inc.,
Illinois Central Railroad Company,
Norfolk Southern Railway Company,
Norfolk & Western Railway Company,
Southern Pacific Transportation Company, and
Union Pacific Railroad Company.

and

Federico Pena, Secretary of Transportation,
Department of Transportation,
S. Mark Lindsey, Acting Administrator, and
Federal Railroad Administration

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IN THE

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No. ———

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and
UNITED TRANSPORTATION UNION,
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v.

THE ATCHISON, TOPEKA AND SANTA FE
RAILROAD COMPANY, *et al.*,

and

FEDERICO PENA, *et al.*,
Respondents.

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

The Brotherhood of Locomotive Engineers and the United Transportation Union, respectfully petition for this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The ruling at issue here, of the United States Court of Appeals for the 7th Circuit, *en banc* is attached hereto (Appendix 1a-20a; hereinafter "App. —"). The ruling

of the three judge panel for the Seventh Circuit, originally affirming the decision of the Federal Railroad Administration is attached hereto at App. 21a-28a.

JURISDICTION

The *en banc* decision of the United States Court of Appeals for the 7th Circuit reversing the ruling of the three judge panel was entered on December 28, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Federal Hours of Service Act (hereinafter "HSA"), provides in pertinent part:

> § 21103. Limitations on duty hours of train employees
>
> (a) GENERAL.—Except as provided in subsection (c) of this section, a railroad carrier and its officers and agents may not require or allow a train employee to remain or go on duty—
>
> (1) unless that employee has had at least 8 consecutive hours off duty during the prior 24 hours; or
>
> (2) after that employee has been on duty for 12 consecutive hours, until that employee has had at least 10 consecutive hours off duty.
>
> (b) DETERMINING TIME ON DUTY.—In determining under subsection (a) of this section the time a train employee is on or off duty, the following rules apply:
>
> (1) Time on duty begins when the employee reports for duty and ends when the employee is finally released from duty.
>
> (2) Time the employee is engaged in or connected with the movement of a train is time on duty.

> (3) Time spent performing any other service for the railroad carrier during a 24-hour period in which the employee is engaged in or connected with the movement of a train is time on duty.
>
> (4) Time spent in deadhead transportation to a duty assignment is time on duty, but time spent in deadhead transportation from a duty assignment to the place of final release is neither time on duty nor time off duty.
>
> (5) An interim period available for rest at a place other than a designated terminal is time on duty.
>
> (6) An interim period available for less than 4 hours rest at a designated terminal is time on duty.
>
> (7) An interim period available for at least 4 hours rest at a place with suitable facilities for food and lodging is not time on duty when the employee is prevented from getting to the employee's designated terminal by any of the following:
>
> (A) a casualty.
>
> (B) a track obstruction.
>
> (C) an act of God.
>
> (D) a derailment or major equipment failure resulting from a cause that was unknown and unforeseeable to the railroad carrier or its officer or agent in charge of that employee left the designated terminal.
>
> . . . .

49 U.S.C. § 21103 [1]

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[1] Formerly contained in 45 U.S.C. § 61(b) and 62(b).

STATEMENT OF THE CASE

This case presents a classic example of a matter that warrants certiorari to be granted. There exists a split in two federal circuits on the interpretation of a federal statute, and it involves a serious railroad safety issue.

The genesis of this litigation arose in 1990 when the affected rail unions brought suits in the district courts of Oregon and the Northern District of California. Both cases were decided by the Ninth Circuit in the same opinion. *United Transportation Union v. Skinner,* 975 F.2d 1421 (9th Cir. 1992).

The Ninth Circuit, in a unanimous decision, held that the HSA was violated by requiring a crew to stay on a train awaiting deadhead transportation. Subsequently, the FRA on October 28, 1992 concluded that the Ninth Circuit's interpretation of the HSA was reasonable, and on January 1, 1993 attempted to apply the Ninth Circuit interpretation nationwide. After several petitions to the Federal Railroad Administration (hereinafter "FRA") to reconsider its decision, various railroads appealed to the Seventh Circuit. In fact three petitions for review were filed with the Seventh Circuit on this same issue.

The initial decision by a three judge panel of the Seventh Circuit held that the decision of the FRA to apply the Ninth Circuit's decision nationwide was reasonable and affirmed the FRA's determination. On Petition for Rehearing and Suggestion of Rehearing *En Banc,* the Seventh Circuit's *en banc* panel granted the railroads' petitions and vacated the FRA's orders.

On March 1, 1995 the FRA sent a letter to the Vice President-Law and General Counsel of the Association of American Railroads informing him that FRA would apply the Seventh Circuit decision in every locale but in those states comprising the Ninth Circuit. (App. 29a-33a). Rather than embarking on an almost interminable number

of appeals in the other circuits, we believe the most reasonable course of action to resolve the controversy is this petition for a Writ of Certiorari.

The HSA limits the hours of work of railroad employees engaged in duties related to train operations and mandates certain off-duty periods. 45 U.S.C. §§ 21101-21107. It limits to twelve hours the number of consecutive hours an employee can remain "on duty." 49 U.S.C. § 21103(a)(1). The HSA also requires that a crew member be allowed ten hours "off-duty" before going back "on-duty" when that employee has worked the twelve hour statutory maximum. 49 U.S.C. § 21103(a)(2). Furthermore, it requires that before an employee may be placed back on-duty, he/she must have received at least 8 hours off-duty during the preceding twenty-four hours. *Id.*

The issue to be resolved in this litigation arises in the common situation when railroad crew members, after working a 12 hour tour of duty, are instructed to stop their train and remain at the site until a new crew relieves them. During that period of time, commonly known as "waiting time," crew members typically are still responsible to their employers for the safety of their train. There exist numerous fact patterns, but normally the crew is not free to leave the train, and continues to be subject to further orders from the railroad. While awaiting arrival of another crew, the employees are required to protect the train against vandalism, assure that the brakes remain properly applied to prevent undesired movement, observe passing trains for defects, and to promptly inform the railroad of any problems noticed. If the crew left the train without permission, it could be disciplined and possibly fired. If the train was vandalized and the crew did not attempt to protect it, the employees would be subject to discipline. If the brakes released and caused an undesired movement, the crew could be disciplined, particularly if an accident occurred as a result. If the crew observed an

obvious defect on a passing train, and did not inform the railroad promptly, the crew might be disciplined.

Both the railroads and the FRA have mischaracterized the issue of "waiting time" as a situation where crew members are "relieved from any further operating responsibilities." The complaints of employees show that crews are frequently compelled to wait for relief crews several hours after expiration of the 12 hour on-duty limit, and sometimes even up to 10 hours longer. One of the safety hazards involved in not counting the above period as on-duty time is that employees are constantly faced with irregular work hours as well as irregular sleep patterns. Extension of the crew members' work day through protracted periods of time spent waiting for deadhead transportation contributes to employee fatigue. This has been shown to be a significant factor in the safety of rail operations. (See *Issues in Locomotive Crew Management and Scheduling,* U.S. Department of Transportation, Federal Railroad Administration DOT/FRA/RRP-91-01 (February, 1991)).

In order to rectify this problem, all that a railroad needs to do is to plan in advance to have a crew ready to relieve the crew on the train, and to have transportation waiting to take the crew to the point of final release. A railroad in most cases has advance notice by following the train movements, and thereby knows whether the crew on the train will reach the 12 hour limit. Also, the crew could inform the dispatcher in advance when and where the 12 hours is likely to expire. In most instances, where waiting time conflicts with the twelve hour rule, these are situations that can be anticipated and properly handled under the HSA.

A review of the statutory language of the HSA, the consistent interpretation of that language by the courts throughout its 88-year history, the legislative history to the 1969 amendments to the HSA, and a consideration of its

remedial purpose, support the conclusion that compulsory time spent waiting by railroad employees for deadhead transportation to their point of final release is time on-duty under the HSA.

REASONS FOR GRANTING THE PETITION

I. THERE IS A SPLIT IN THE CIRCUITS REGARDING THE INTERPRETATION OF THE HOURS OF SERVICE ACT.

As previously indicated the Seventh and Ninth Circuits have reached opposite decisions as to whether compulsory time spent waiting by a train crew for deadhead transportation to its point of final release is "on-duty time" under the HSA.

A. The Ninth Circuit Has Concluded That Compulsory Time Waiting for Deadhead Transportation Is To Be Considered as Time on Duty Under the Hours of Service Act.

The Ninth Circuit in a well reasoned opinion held:

> In conclusion, we note once again that waiting time has been considered time on duty throughout the eighty-five year history of the HSA. The FRA's position that this understanding was changed by the 1969 proviso regarding deadhead time finds no support in the statutory language, in the legislative history of the 1969 amendments, or in the policies underlying the statute, and is contrary to reason. Accordingly, we reject it.

975 F.2d at 1428.

B. The Seventh Circuit *En Banc* Has Concluded That the Time Waiting for Deadhead Transportation Is Not To Be Counted as Time on Duty Under the Hours of Service Act.

On the other hand the Seventh Circuit held:

> Further, we hold that, according to the Act, time spent waiting for transportation to a designated

> terminal by a train crew that has been relieved of all operating duties of the train to which it is assigned is not time on duty, but limbo time.

Slip Op. 13, App. 14a.

At this point in time we will not burden the Court with an analysis why we believe the Seventh Circuit missed the point as to what the HSA literally states and what was intended by Congress. Suffice it to say that an analysis of the HSA's remedial purpose, its legislative history, and various courts' consistent interpretations since 1907 (including the 1969 amendments), lead to only one valid conclusion—compulsory time spent waiting by railroad employees for deadhead transportation to their point of final release is time on duty under the HSA.

II. THERE EXITS A SERIOUS SAFETY ISSUE WHICH IS DIRECTLY IMPACTED BY THE DECISION OF THE SEVENTH CIRCUIT.

There can be no justifiable disagreement that there exists a direct relationship between fatigue and accidents. *See e.g.* H.R. Rep. No. 91-469, 91st Cong., 1st Sess. 6 (1969). Stress in the workplace, resulting from long and irregular work hours, has long been a source of concern for railway workers, and has recently come to the attention of society at large.

Accidents caused by human error have consistently been a significant portion of the total number of railroad accidents occurring in any given year. Approximately 80% of the railroad accidents investigated by the NTSB over the past 10 years are the result of human error. In the past five years railroad accidents caused by human error consistently have accounted for approximately one-third of all train accidents. Preliminary statistics for 1994 show that 34% of the accidents were caused by human error.

According to Dr. Charles Czeisler, then Director of Circadian and Sleep Disorders Medicine at Brigham and Women's Hospital in Boston, (New York Times, May 15, 1990 at pg. C8) "because their reaction time is affected . . . . sleep deprived people may be more prone to making mistakes on the job." Indeed, sleep researchers indicate that sleepiness is second only to drunkenness as a cause of automobile accidents. The Department of Transportation, in a report to Congress, stated that at least 40,000 traffic accidents a year may be sleep related, and that more than 20% of all drivers have fallen asleep at the wheel.

In 1984, Michael K. Coplen, a locomotive engineer in Gillette, Wyoming published an article concerning the effect of sleep habits on shift workers in the Rocky Mountain News, May 21, 1984 at 39. Coplen referred to several industrial accidents (two train accidents and the Three-Mile Island incident) noting that in each case the accidents occurred between the hours of 3 a.m. and 5 a.m. which, according to several researchers, is the lowest point in our daily cycle of alertness. In addition, Coplen cited an analysis of a fatal crash of a United Airlines plane near Salt Lake City in 1977, where the author concluded that "fatigue caused by frequently changing shift work schedules . . . fostered a series of errors that compounded into a fatal crash."

In the testimony of Dr. Donald I. Tepas, who testified as an expert at the May 12, 1988 hearing by the National Transportation Safety Board regarding the fatal head-on collision of two Conrail trains at Thompsontown, Pennsylvania on January 14, 1988, regularity of work shifts is indeed of great concern in the railroad industry. At the time, Dr. Tepas was a Professor of Psychology and Director of the graduate program in Industrial and Organizational Psychology at the University of Connecticut. Dr. Tepas also served as the U.S. representative on the Scientific Committee on Night and Shift Work of the

International Commission on Occupational Health. According to Dr. Tepas, work systems which result in night work, shifts of unusual length, and unpredictable work hours, such as are presently employed by the railway industry, place workers and the general public at risk by creating a situation in which the workers ultimately become victims of chronic sleep deprivation. NTSB Hearings on *Head-End Collision of Consolidated Rail Corporation Freight Trains UBT-506 and TV-61 Near Thompsontown, Pennsylvania, January 14, 1988,* at 1622.

Dr. Tepas' studies on the effect of sleep deprivation and unpredictable and irregular work/rest cycles were summarized in the *National Transportation Safety Board Railroad Accident Report, Head-End Collission of Consolidated Rail Corporation Freight Trains UBT-506 and TV-61 Near Thompsontown, Pennsylvania, January 14, 1988, NTSB/RAR-89/02, (1989)* (Hereinafter *NTSB Report*). According to Dr. Tepas, workers do not remedy this hazardous condition by making up for lost sleep on their days off, nor do they "adapt" to the irregular work hours. Dr. Tepas testified that chronic sleep deprivation results in fatigue, frequent microsleeps or lapses (periods in which workers fall asleep for a short time then awaken spontaneously, unaware that they had been sleeping at all). *NTSB Report,* at 37. Dr. Tepas notes that the frequency and duration of such lapses increase as the person becomes more chronically sleep-deprived. *Id.* Although the worker will perform his task perfectly both before and after the lapse, he is asleep during it. As a result, the worker will not respond at all to external stimuli unless they are massively sensory in nature, very unusual, or particularly meaningful. *Id.*

Also, Dr. Tepas stated that workers subject to non-systemic and unpredictable changes in their work schedules are highly susceptible to variation in alertness and consciousness that are associated with their circadian "body-clock," which is typically at its lowest ebb between

roughly 1 a.m. and 7 a.m. He said that workers suffering from the effects of chronic sleep deprivation are more susceptible to environmental conditions which promote sleep. Extensive studies have been conducted on operating crews in which, not only single crew members, but on some occasions, entire crews have fallen asleep while performing their jobs. *Id.*

Based upon the NTSB's analysis of the Thompsontown accident and other prior accidents it concluded:

> 17. The changing nature of railroad operations and competitive factors have materially increased the relative number of train crew members who must work irregular and unpredictable shifts on a long-term basis.
>
> 18. Since train crew members lack the requisite training to recognize the condition, they may allow themselves to become chronically sleep-deprived and develop physiological problems that impact adversely on their performance. Conrail and the other railroads need to recognize and deal with this probability by modifying their operations to reduce shift irregularity and by instituting educational and intensified medical examination programs.

(*NTSB Report* at 53).

Unpredictable work/rest cycles of the crew was cited by the NTSB as one of the causes of the Thompsontown accident.

(*NTSB Report* at 54).

As pointed out by the former Chairman of the NTSB, James L. Kolstad, in testimony on February 19, 1991 before the *House Subcommittee on Transportation and Related Agencies, Committee on Appropriations, concerning both the August 9 and November 7, 1990, railroad accidents at Sugar Valley, Georgia and Corona, California,* work/rest cycles of railroad crew members is a con-

cern. He said that crew member fatigue has been placed on the NTSB's "Most Wanted" list of safety issues.

(Testimony at p. 22).

Again, on June 12, 1991, Mr. Kolstad testified on the *Railroad Safety Reauthorization before the House Subcommittee on Transportation and Hazardous Materials, Committee on Energy and Commerce,* where he stated:

> Human performance is still the most important factor in any accident, in any mode of transportation. An operator who is inattentive, for whatever reason, can expect to find himself in an accident sooner or later. Too often, that inattention is caused by fatigue.
>
> Railroad employees, especially train crews, are confronted by very unpredictable and tiring work schedules—a situation that has not changed since the beginning of railroading. The changing nature of railroad operations and competitive factors have increased the relative numbers of crewmembers and others in safety sensitive positions who must work irregular and unpredictable shifts—often on a long term basis.

Hearings, p. 167.

He also said that "We have found in accident after accident that workload and work/rest issues have been critical factors." *Id.*

The NTSB's Report of the Corona, California accident on November 7, 1990, also demonstrates the hazards in railroad operations resulting from irregularity and unpredictability of a train crew's work schedule. The Board concluded that both of the locomotive crew members had fallen asleep because of acute fatigue, partly resulting from the irregularity and unpredictability of the work schedule. *(National Transportation Safety Board Railroad Accident Report, Atchison, Topeka and Santa Fe Railway Company (ATSF) Freight Trains 818 and ATSF*

on 891 on the ATSF Railway Corona, California (November 9, 1990) RAR-91/103 at p. 45 (July 23, 1991).

Further support of the adverse safety effects of irregular work cycle is contained in *Biological Rhythms, Sleep, and Performace,* by Wilse B. Webb at pp. 59-87, 110-141, 175-204 (John Wiley & Sons 1982); and testimony of Dr. Charles Czeisler at the *Hearings* on *Shift Work Scheduling and Biological Clocks Before the House Subcommittee on Investigations and Oversight of the Committee on Science and Technology,* 98th Cong., 1st Sess. 176 (1983).

The FRA itself has undertaken two studies of the issues related to irregular work hours, excessive work hours, and waiting time, on February 1991 and June 1992. See *Issues in Locomotive Crew Management and Scheduling,* U.S. Department of Transportation, Federal Railroad Administration DOT/FRA/RRP-91-01 and DOT-VNTSC-FRA-91-1 (February, 1991), and *Engineman Stress and Fatigue: Pilot Tests,* U.S. Department of Transportation, Federal Railroad Administration, DOT/FRA/ORD-92-17 (June, 1992). In the earlier study the findings were that: (1) Two of the three focus groups involved in the study cited unpredictable working hours as the most important single cause of stress and fatigue; (2) Many participants noted sleep was often taken at times and in amounts which were inappropriate to the hours on-duty which followed, otherwise the employee would hardly ever be able to participate in family activities; (3) In the first focus group the railroad's train scheduling system is sufficiently advanced to provide 8 hours advance notice of jobs about 90% of the time; (4) Eight hours off duty seldom translates into more than four hours sleep because of the time required to get to a motel and eat coupled with the fact that sleep will be interrupted by a telephone call two hours before the next job starts.

In the second FRA study, some of the findings showed that: (1) during the course of the experiment subjects tended to doze off, presenting the possibility of serious performance errors; and that (2) the sleep records of engineers were irregular and atypical when compared with non-engineers.

Finally, even the FRA, in its latest position on this overall issue, pointed out the safety hazards associated with irregular work hours and lack of rest. (See App. 29a):

> FRA has long been concerned about instances in which employees are held on trains for several hours while awaiting the arrival of deadhead transportation in the absence of any valid emergency that might explain such an occurrence. To the extent that the waiting periods are extremely lengthy, current scientific information concerning sleep cycles and the effects of fatigue on safety-sensitive perfomance indicates that the waiting periods could contribute to the cumulative exhaustion of the employee. This cumulative exhaustion could occur even though the employee receives the legally required rest period upon arrival at the point of final release.

Based upon the serious consequences to safe railroad operations that arise from the opinion of the Seventh Circuit in acting contrary to case law, the law's historical application, its legislative history, and its remedial purpose, this case warrants review by the Court.

CONCLUSION

In conclusion, we respectfully request that the Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 93-1505, 93-2378, and 93-2712

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, BURLINGTON NORTHERN RAILROAD COMPANY, CONSOLIDATED RAIL CORPORATION, CSX TRANSPORTATION, INC., ILLINOIS CENTRAL RAILROAD COMPANY, NORFOLK SOUTHERN RAILWAY COMPANY, NORFOLK & WESTERN RAILWAY COMPANY, SOUTHERN PACIFIC TRANSPORTATION COMPANY, and UNION PACIFIC RAILROAD COMPANY,
Petitioners,

v.

FEDERICO PEÑA, Secretary of Transportation, *et al.*,
Respondents,

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, and
UNITED TRANSPORTATION UNION,
Intervening Respondents.

On Petitions for Review of Orders of the
Federal Railroad Administration

ARGUED FEBRUARY 22, 1994—DECIDED JULY 13, 1994
ARGUED EN BANC OCTOBER 18, 1994—
DECIDED DECEMBER 29, 1994

Before POSNER, *Chief Judge*, BAUER, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, KANNE, and ROVNER, *Circuit Judges.**

BAUER, *Circuit Judge*. Petitioners, nine of the nation's largest railroads accounting for ninety percent of the industry's train operations, petition for review of the Federal Railroad Administration's (FRA) re-interpretation of the Hours of Service Act of 1907, 45 U.S.C. §§ 61-66. The railroads challenge the FRA's recent announcement that it was abandoning an established interpretation of the Act and would consider as time on duty that time spent waiting for transportation to a designated terminal by a train crew that has been relieved of all operating duties of the train to which it is assigned. We find that the FRA's decision is entitled to no deference, and we interpret the Act, and eighty-five years of industry practice, such that this waiting time does not constitute time on duty.

Some background is necessary to place this issue in proper context. The Hours of Service Act imposes a limit on the maximum hours of service that a train crew can continuously operate trains while on duty. From the date of its original enactment through the late 1960's the Interstate Commerce Commission administered and enforced the Act. Then, the Federal Railroad Administration, a component of the Department of Transportation, was created to take over those duties from the ICC.

"The purpose of the statute is to promote safety in operating trains by preventing the excessive mental and physical strain which usually results from remaining too long at an exacting task." *Chicago & A.R. Co. v. United States*, 247 U.S. 197, 199 (1918). In its original form, the Act limited train crews to sixteen continuous hours operating trains. c. 2939, § 2, 34 Stat. 1416 (codified as amended 45 U.S.C. § 62(a)(1)). Congress amended the Act so that

* The Honorable Walter J. Cummings did not participate in the argument or decision in this case.

since 1971, the maximum shift consists of twelve hours. 45 U.S.C. § 62(a)(1). The Act also imposes mandatory time off duty before an employee can resume his operating duties. An employee who has worked a continuous twelve-hour shift must receive ten consecutive hours off duty. *Id.* In addition, no employee can be called to operations duty unless he has received eight continuous hours of off-duty time in the preceding twenty-four interval. 45 U.S.C. § 62(a)(2).

Because of the itinerant nature of railroad operations, the limitation on a train crew's hours of service presents special problems on railroads. Obviously, when a train crew reaches its twelve-hour maximum it must cease operating its assigned train. If the train has not yet reached its destination, the "expired" or "outlawed" crew must "park" the train and wait for transportation to its designated terminal. The transportation typically is in the form of a railroad-owned van or another train going to the crew's designated terminal. The desigated terminal may be the crew's home terminal or the "away from home" terminal designated by the railroad. *See* 45 U.S.C. § 61(b)(4). The railroad must then transport another crew to the parked train to operate the train until it reaches its destination. Transportation to or from a parked train is called "deadhead" transportation.

In its 1969 amendments to the Act, Congress addressed the categorization of the time spent by crews in deadhead transportation. Section 61(b)(3)(C) includes as time on duty that "[t]ime spent in deadhead transportation by an employee to a duty assignment: *Provided*, [t]hat time spent in deadhead transportation by an employee from duty to his point of final release shall not be counted in computing time off duty . . . ." The time spent in deadhead transportation from the parked train to the crew's designated terminal became known as "limbo time:" time which does not count against the twelve-hour limitation upon on-duty time nor contributes to the off-duty time that

necessarily must accrue before an employee may return to duty. Unfortunately, the Act does not specifically address how time spent by an outlawed crew waiting for deadhead transportation must be categorized. Since the enactment of the 1969 amendments to the Act, the FRA has treated this waiting time as though it was time spent in deadhead transportation to the crew's designated terminal; the waiting time, thus, has been treated as limbo time. In addition, it appears that the Act, at least in the practical terms of the way it had been enforced since 1907, had never been construed to require that this waiting time be considered time on duty.

Things changed in 1992. In that year, the Ninth Circuit Court of Appeals rejected the FRA's interpretation of the Act in *United Trans. Union v. Skinner*, 975 F.2d 1421 (9th Cir. 1992). Oddly, the Ninth Circuit held that the time spent waiting for deadhead transportation to a crew's designated terminal is time on duty, "based on the language of the HSA and on its consistent interpretation by the courts throughout its 85-year history." *Id.* at 1422. In an unusual move in that case, while it vigorously defended its own interpretation of the Act, the FRA declared itself willing to adopt and enforce the Ninth Circuit's interpretation of the Act, whatever its decision.

As a result of the Ninth Circuit's decision, the FRA notified, by way of a letter dated October 28, 1992, from its Chief Counsel, the Association of American Railroads that while the FRA has traditionally regarded the waiting time as limbo time, it no longer would. The letter stated that the FRA did not agree with the Ninth Circuit's rationale, but would adopt it and enforce it nationwide. The FRA implemented its new enforcement scheme on November 1, 1992, in those states that comprise the Ninth Circuit, and on January 1, 1993, in the rest of the country. Within sixty days of the nationwide effective date, the railroads filed in this court a petition for review

pursuant to 45 U.S.C. § 431(f) and 28 U.S.C. § 2342(7). In addition, the railroads filed with the FRA a Petition for Interpretation of the Hours of Service Act on March 26, 1931.[1] On April 8, 1993, the FRA published its new interpretation of the Act in the Federal Register, much of which was taken verbatim from the FRA's letter to the railroads. From this agency action, the railroads filed another petition for review on June 7, 1993. Finally, in response to the FRA's July 1, 1993, denial of the railroad's Petition for Interpretation, the railroads filed yet another petition for review from this agency action. All told, the railroads filed three petitions for review.

This description of this flurry of activity between the FRA and the railroads leads us to inquire whether we have jurisdiction to settle this dispute. Section 2342(7) of Title 28 confers exclusive jurisdiction upon the appropriate court of appeals to enjoin, set aside, suspend, or to determine the validity of all final agency actions with respect to federal railway safety laws. All that is required to invoke this jurisdiction is the filing of a petition in accordance with 28 U.S.C. § 2344, which the railroads have done. Because the FRA's action is clearly within the ambit of the federal railway safety laws, the only possible issue with respect to our jurisdiction is whether the FRA's conduct constitutes a final agency action within the meaning of the statute.

Congress amended § 2342 in 1992 to include subsection 7. Because of the recent vintage of this amendment, there is a lack of authority as to what constitutes a "final agency action" pursuant to 28 U.S.C. § 2343(7). Because it appears that "final agency action" in this context carries the same meaning as it does in the Administrative

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[1] The railroads apparently modeled their Petition after the type described in 5 U.S.C. § 553(e). As we shall soon see, agencies such as the FRA, who promulgate only "interpretive rules," are not subject to such Petitions.

Procedures Act, § 10(c), 5 U.S.C. § 704, we will apply the same standards applicable to the APA.

Several factors are significant in determining the finality of agency action, including: 1) whether the challenged action is a definitive statement of the agency's position; 2) whether the actions have the status of laws with penalties for noncompliance; 3) whether the impact on the aggrieved party is direct and immediate; and 4) whether immediate compliance was expected. *Abbott Laboratories v. Gardner,* 387 U.S. 136, 150-52 (1967). After reciting these factors, the Supreme Court recently stated that "[t]he core question is whether the agency has completed its decisionmaking process, and whether the resut of that process is one that will directly affect the parties." *Franklin v. Massachusetts,* 112 S. Ct. 2767, 2773 (1992).

In this case, there is no question that the FRA made absolutely clear that it would enforce the Act in accordance with its new interpretation, thereby compelling the railroads to alter their operations to comply with the FRA's directive or face stiff penalties for noncompliance. To answer the "core question," the agency completed its decisionmaking process (or at least the Ninth Circuit completed the FRA's decisionmaking for it) and the result directly affected the railroads. The FRA's communication of its change in interpretation of the Hours of Service Act constitutes a final agency action within the context of 28 U.S.C. § 2342(7), and therefore, we have jurisdiction to hear this case and we grant the railroads' petitions for review.[2]

[2] It is not necessary that we parse out which of the three agency communications of its decision to change its interpretation of the Act constitutes a "final agency action." The railroads timely filed petitions in response to all three agency missives, each of which presents the sole issue in this case. Obviously, the FRA's publication of its decision in the Federal Register was the communication of the most official character, but this publication, as well as the first letter to the railroads and the letter rejecting the railroads' Petition for Interpretation, demonstrate that the agency had completed its decisionmaking. Thus, the jurisdictional dictates are clearly satisfied.

The first issue here is what deference, if any, we are to allow the FRA's new interpretation of the Act. The FRA argues that its interpretation of the Act is entitled to substantial deference pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). Under *Chevron,* the interpretation of an ambiguous statute by an agency that is authorized by Congress to promulgate rules under the statute is to be upheld if it is a reasonable one. While the Hours of Service Act is not unambiguous, the FRA's interpretation is not entitled to the generous treatment afforded agency interpretations under *Chevron.*

Both the railroads and the FRA agree on an important point: that the FRA has not been granted rule-making authority by Congress. The Supreme Court made clear in *Chevron,* 467 U.S. at 843-44, that only statutory interpretations by agencies with rule-making powers deserve substantial deference. The principal rationale underlying this deference is that in this context the agency acts as a congressional proxy; Congress develops the statutory framework and directs the agency to flesh out the operational details. But Congress typically does not permit the agency to run free in this endeavor; the Administrative Procedures Act establishes certain procedures that the agency must follow. Chief among them is the notice-and-comment provision of the APA. 5 U.S.C. § 553. This rulemaking process bears some resemblance to the legislative process and serves to temper the resultant rules such that they are likely to withstand vigorous scrutiny. It is this process that entitles the administrative rules to judicial deference.

In instances in which the agency does not have rulemaking authority, however, we consider the agency's application of statutory provisions "interpretive rules." 5

U.S.C. § 553(d)(2); *see Doe v. Reivitz,* 830 F.2d 1441, 1447 (7th Cir. 1987). These interpretive rules are treated differently by the APA. They are exempt from the notice-and-comment requirements of rule-making. 5 U.S.C. § 553(d)(2). In addition, interested parties do not have the right to petition the agency for review of its interpretive rulings as they do with respect to agency rules. *See* 5 U.S.C. § 553(e).

The difference between the two types of agency action is manifest in this case. The FRA arbitrarily decided to abandon twenty-three years (at least) of statutory interpretation and adopted the Ninth Circuit's interpretation, even though it acknowledged that that court's rationale was flawed. The FRA's adoption of that position was not subject to the sort of process that ensures the legitimacy of the legislative or administrative rule-making process. Moreover, the railroads were not permitted to petition the FRA for review of its new interpretations; when they did, the FRA (properly) informed them that it was not required to respond. As a result, considering that the FRA made it clear that it was going to enforce this new interpretation, the railroad's only course of action was to seek judicial review under Title 28.

This is not to say that interpretive rules, while undeserving of substantial deference under *Chevron,* do not warrant any deference from a reviewing court. It simply means that we do not "rubber stamp" these interpretive rules. *Pennington v. Didrickson,* 22 F.3d 1376, 1383 (7th Cir. 1994). Whatever degree of deference due these interpretive rules is dictated by the circumstances surrounding the agency's adoption of its statutory interpretation. "The weight given to an agency interpretation depends on many factors, including the validity of its reasoning, its consistency with earlier and later agency pronouncements and whether the administrative document was issued contemporaneously with the passage of the statute being interpreted." *Doe v. Reivitz,* 830 F.2d

at 1447. In short, we look to "the thoroughness, validity, and consistency of the agency's reasoning." *Orrego v. 833 West Buena Joint Venture,* 943 F.2d 730, 736 (7th Cir. 1991) (citing *United States v. Markgraf,* 736 F.2d 1179, 1184 (7th Cir. 1984)).

The FRA's current interpretation of the Act reflects none of the benchmarks indicative of a "deliberate attempt of the agency to implement the will of Congress through the regulatory process." *Pennington,* 22 F.3d at 1383. By its own admissions, the characteristics of the FRA's current interpretation are completely opposite to those for which we seek. The current interpretation is inconsistent with twenty-three years of agency enforcement; notwithstanding its present plaintive cries that it has always considered this a close question, the FRA has always enforced the Act in a manner opposite that of its current position. In addition, this is an interpretation not contemporaneously made with the legislation or its relevant amendments, but twenty-three years later.

Finally, the FRA's current interpretation is not a thorough and reasoned interpretation. It was adopted for no other reason than because the Ninth Circuit disagreed with its prior interpretation. In its letter to the railroads and in its notice in the Federal Register, the FRA candidly admitted that it did not agree with the Ninth Circuit's reasoning. It cannot now rely on *post hoc* rationalizations regarding safety to justify its abrupt decision to alter its interpretation. This interpretation by the FRA, lacking the characteristics for which we look to determine the reasonableness of agency action, deserves no deference from this court.

A final point with respect to deference: Any deference that we might confer upon an agency interpretation of a statute must be to the agency's diligent study of the statute and the underlying activity it seeks to regulate. Here, however, the FRA is essentially asking that we defer to the Ninth Circuit's interpretation of the Act.

It was the Ninth Circuit to which the FRA delegated its authority to interpret the Act when it declared that it was willing to accept whatever determination the Ninth Circuit made. And while we carefully consider the opinions of our sister circuits, we certainly do not defer to them. *Colby v. J.C. Penney Co., Inc.*, 811 F.2d 1119, 1123 (7th Cir. 1987). Our duty is to independently decide our own cases, which sometimes results in disagreements with decisions of the other circuits.[3] The FRA's abdication of its authority in this matter serves to deny the FRA the substantial deference it seeks.

Having dispensed with the issue of deference, we move on then to decide whether time spent waiting for deadhead transportation is time spent on duty. Despite the vigor with which this issue has been litigated both here and in the Ninth Circuit, we believe the statute itself resolves this issue quite clearly. Mindful that the purpose of the Act and its amendments is safety in operating trains, we hold that time spent waiting for deadhead transportation is not time on duty, but limbo time.

The statute does not address this issue in so many words, but it clearly dictates our holding. Section 61 (b)(2) states that the Act applies only to employees "actually engaged in or connected with the movement of any train . . . ." In addition, according to section 61 (b)(3) of the statute, time on duty commences when a crew reports for duty and terminates when the crew is finally released from duty. Further, section 61(b)(3) (D) specifically states that time on duty is comprised of "time an employee is actually engaged in or connected with the movement of any train." The statute's treatment

[3] *United States v. Coleman*, 38 F.3d 856 (7th Cir. 1994) (in conflict with *United States v. Carillo*, 991 F.2d 590 (9th Cir. 1993)), and *United States v. Michelle's Lounge*, No. 92-3235, slip opinion (7th Cir. October 27, 1994) (in conflict with *United States v. Consiglio*, 866 F.2d 310 (9th Cir. 1989)), are but two recent examples of disagreements with the Ninth Circuit.

of on-duty time makes sense and comports with the purpose of the statute; the hazards of train operation occur when the train is moving.

During the time an outlawed crew waits for its deadhead transportation, however, it has no further operational duties.[4] Obviously, this time spent waiting by the outlawed crew is not time the crew operates a moving train. Unfortunately, the resolution of this issue is not so simple. Remember, time spent in deadhead transportation to the parked train is considered on-duty time. Our evaluation of the time spent waiting for deadhead transportation from the train, then, is directed by the statute's emphasis on the operation of a moving train and the statutory scheme regarding this type of non-operational time.

After a crew completes its shift, each employee is required to receive a specified time during which he is able to rest before he is able to operate a train again. Thus, any time spent by an employee that denies him adequate opportunity for rest or that detracts from the rest that he has received must be treated in a way that enhances safety in operating a moving train. Simply put, in characterizing time spent by an employee not directly connected to the operation of a moving train, the critical consideration is how that time will affect the employee who must operate a moving train. Two specific aspects of the 1969 amendments to the Act highlight these principles.

As mentioned previously, section 61(b)(3)(C) states that time spent in deadhead transportation by an employee *to* a duty assignment is time on duty. This is time

[4] We do not address in this case the situation in which an outlawed crew is called upon to perform additional, non-operational, duties during and after its twelve-hour shift. The statute accounts for that circumstance; in instances in which additional duties are commingled with those of operating a train, the entire time spent by the crew is considered time on duty. 45 U.S.C. § 62(b).

the employee cannot spend resting and which may ultimately impact his performance during the latter hours of his shift. This section also states that time spent in deadhead transportation *from* the train to the point of final release is not off-duty time. Nor is it time on duty; hence the tag limbo time. This time is treated in this way for two reasons. First and foremost, it is not on-duty time because the employee has no more operational responsibilities and this time, therefore, does not implicate railroad safety. Second, it is not off-duty time because the employee receives no legitimate opportunity to rest.

This analysis of section 61(b)(3)(C) compels our finding that time spent waiting for deadhead transportation is limbo time. In this scenario, the crew has been relieved of all operating duties. It may await transportation on the train or leave the train to await transportation elsewhere. The crew just might retire to a nearby saloon to pass the time. Wherever the outlawed crew waits, it is precluded from operating the train, technically by the statute and practically by the railroad, until the crew receives the requiste off-duty time. The crew's time spent waiting has absolutely no impact on its ability to operate trains. In this way, the waiting is analogous to time spent in deadhead transportation from a duty assignment and is not analogous to time spent in deadhead transportation to a duty assignment. Further, the strong analogy between the waiting time and the time actually spent in deadhead transportation dictates that the waiting time be treated as limbo time.

Having determined that the statute resolves the issue, the dispute as to how this time was treated prior to the amendments is unimportant. We digress, however, to briefly explain our understanding of its pre-1969 treatment because the Ninth Circuit framed its decision in that way. The Ninth Circuit set forth the issue as to whether Congress had intended to change the characterization of waiting time as the Act had been applied before the amendments. *Skinner*, 975 F.2d at 1426. It determined that waiting time had been considered on-duty time and based its holding on a slew of cases from the early part of this century. *Id.* We however, read those cases as addressing the categorization of time spent by a railroad crew waiting for repairs to be made or for some other delay before resuming its duties of operating the train; these cases held that the crews were on duty during the time they spent waiting. The holdings in those cases are consistent with our reasoning here: that time spent waiting must be evaluated for its impact on the crew's ability to operate its train.

In addition, there was a substantial amount of testimony at Congressional hearings, offered by both union and railroad representatives, that this waiting time was never treated as on-duty time. So, it appears that time spent waiting for deadhead transportation from a train was treated the same before the amendments as immediately after. Our determination simply underscores the point that the FRA's change in interpretation of the statute reversed a long-held practice of deploying crews and imposed a significant hardship on the railroads without contributing to railroad safety.

The FRA contends that there are safety issues associated with categorizing waiting time as limbo time. If that is so, the appropriate vehicle for changing the Act is further legislation. Congress has spoken its mind on this matter, and if it changes its mind, it can amend the Act. But the FRA may not effectively amend the statute by way of an interpretive rule to comport with its views on how this waiting time impacts safety issues, whether they be real, illusory, or just plain convenient.

Finally, the FRA contends that by invalidating its interpretation, we will create an enforcement nightmare resulting from this split between circuits. That may be true, but there is nothing we can do about it. We can only remind the FRA that it is entrusted with the en-

forcement of the Hours of Service Act and any decision it makes to refrain from prosecuting violations of the Act is left to its absolute discretion. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (collecting cases).

In conclusion, we find that the FRA's communications of its interpretation of the Hours of Service Act constitute a final agency action pursuant to 28 U.S.C. § 2342(7), but conclude that it is not entitled to any deference from this court. Further, we hold that, according to the Act, time spent waiting for transportation to a designated terminal by a train crew that has been relieved of all operating duties of the train to which it is assigned is not time on duty, but limbo time. Accordingly, we GRANT the railroads' Petitions for Review and VACATE the FRA's orders.

EASTERBROOK, *Circuit Judge*, with whom POSNER, *Chief Judge*, and MANION, *Circuit Judge*, join, concurring. When judges speak of "deference" to an administrative decision or interpretation, they may mean any of three situations:

- Delegation. When Congress has given an agency the power to adopt legal norms via formal rulemaking or administrative adjudication, the court must accept action within the scope of the delegated power the same way it accepts legislation.
- Respect. When the statute tells the executive branch to achieve a goal, the choices made in pursuit of that objective are political in nature. The President rather than a judge decides how to execute the laws, and a court therefore must respect the discretionary choices a coordinate branch of government has made in the course of implementation.
- Persuasion. On a "pure" question of law, an agency's views may persuade when they cannot compel. To the extent statutory text and structure are conclusive on the issue of meaning, an agency may persuade by illuminating how the pieces of the statute fit together. To the extent other factors (collectively "legislative intent") matter, the agency may have better access to indicators of this intent than do judges.

Using one word for three distinct subjects breeds confusion. Justice Breyer believes that it has done worse—that it sometimes has led courts to give more force to an agency's legal arguments (the "persuasion" category) than to the agency's choices about wise policy (the "respect" category), reversing the proper role of the political and judicial branches. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363 (1986).

Today's case shows how vocabulary affects analysis. The Federal Railway Administration has not been delegated either rulemaking or adjudicative power over the subject of hours of service. It therefore cannot demand obedience to its law-making choices after the fashion of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990). But it does oversee implementation of the wages and hours laws (and much else of concern to railroads and their workers), and therefore not only may have persuasive thoughts about the interpretation of the laws but also may be entitled to make some choices about implementation.

When an agency seeks to persuade us that its legal analysis is correct, we pay attention to whether it has longstanding, consistent views, see *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), for a legal interpretation adopted soon after the statute's enactment may be the best evidence of the meaning the words carried in the legal profession at the time. Alterations in the legal and cultural landscape may make the meaning hard to recover; a contemporaneous understanding captures much of value, while changes of position may reflect only a shift in views of sound policy and therefore do not assist in ascertaining the original meaning. See *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 100-02 & n.7 (1991). When, however, an agency offers a view about wise administration, a change in perspective may show that the agency is sensitive to the contemporary economic context—the railroad industry, for example, has undergone a revolution in the last 30 years—and therefore is doing its job. Applying the word "deference" to both respect and persuasion implies that consistency of administrative views always cuts in favor of the agency's position. Yet consistency ought to matter only when the agency is seeking to persuade—and even then only when the consistent interpretation offers us a view into the understanding of the original interpretative community. See *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 259-60 (1991) (Scalia, J., concurring); *Mayburg v. Secretary of HHS*, 740 F.2d 100, 105-07 (1st Cir. 1984) (Breyer, J.). See also Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 Wash. U. L.Q. 351 (1994); Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2101-04 (1990).

Taking "deference" as a unitary concept, my colleagues observe that the FRA has changed positions, and they conclude that its position is therefore not entitled to deference. I look at this differently. If the question is the way 45 U.S.C. § 61(b) treats deadhead transportation at the end of duty, then consistency is informative—and the FRA has been consistent. Ever since 1907, when the Hours of Service Act came into being, the FRA and its predecessors have believed that time between the end of work and arrival at a place of rest does not count as time on duty. The agency adhered to this position immediately after the 1969 amendments and has not wavered. The published statement that we review, 58 Fed. Reg. 18163-66 (Apr. 8, 1993), reiterates this position, stating that the FRA disagrees with the legal analysis of *United Transportation Union v. Skinner*, 975 F.2d 1421 (9th Cir. 1992). To the extent the question at hand is "Does 45 U.S.C. § 62(b) treat time after the crew is relieved of work on the train as time 'on duty'?", the FRA has been consistent; and to the extent stability lends persuasive force to its position, we should be falling into line.

After reaching a judgment about the interpretation of the Hours of Service Act, the FRA reached a second judgment—about the desirability of uniform application. It told the ninth circuit, announced in the Federal Register, and now has told us, that a single national rule is superior given the integrated nature of the national railroad system. Once again the agency has been consistent. Its views about the benefits of uniformity induced it to

put the ninth circuit's interpretation into force nationwide, despite its belief that the ninth circuit got the law wrong. If the combination of the two can be called a flip-flop (on the ground that the FRA now is administering the Act differently), the change is attributable to the malleable legal landscape. Agencies ought to respond to legal and economic changes rather than to plow on as if nothing had happened. In making a judgment that a uniform rule is preferable to subjecting the railroads (and perhaps particular crews) to multiple legal schemes, the agency has adopted a position on sound administration. We must decide whether this is the type of decision that deserves our respect.

To change the terminology, the FRA decided to acquiesce in the ninth circuit's interpretation. It thought that litigation should come to an end without the complicated dance that generates a conflict among the circuits and so propels the subject onto the Supreme Court's agenda. The FRA believes that on this subject it is "more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). Courts regularly denounce agencies for *not* following judicial interpretations, so it is a little surprising to see the FRA boxed about the ears for complaisance. Agencies stick to their guns when they believe the difference in legal positions or practical consequences important; but if they think that the arguments are closely balanced or the practical consequences of the two positions similar, they may conclude that one case is enough—especially if they think that the Solicitor General would not deem the subject sufficiently important to justify a petition for certiorari. If the Solicitor General declines to seek, or the Supreme Court declines to grant, further review, then nonacquiescence may yield entrenched differences among the circuits. We know from *United States v. Mendoza*, 464 U.S. 154 (1984), that the executive branch need not

follow a circuit's interpretation, even within that circuit's borders. See also Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679 (1989); cf. Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 Cardozo L. Rev. 43 (1993). But an agency prudently may decide to acquiesce, to reduce uncertainty and the costs of both the legal process and compliance with multiple standards, a particular problem for firms with peripatetic operations.

When an agency declines to acquiesce, a court does not "defer" to this decision. A person aggrieved by the agency's decision to fight like a tiger is entitled to judicial review. The court construes the statute after an independent inquiry, and the agency prevails only if it has the stronger argument on the merits. Just so with acquiescence. A party aggrieved by the agency's decision to throw in the towel may protest and obtain an independent decision. Acquiescence and nonacquiescence are mirror images when each produces winners and losers in the private sector. If courts review nonacquiescence decisions without a thumb on the scale in favor of the agency's choice, they must review acquiescence decisions independently. *Mendoza* itself supplies a strong argument: additional litigation may lead to a conflict among the circuits and review by the Supreme Court with the benefit of additional legal views that increase the probability of a correct disposition. Today's decision may well lead the Supreme Court to address the question. An agency may be wise in thinking that national uniformity is highly desirable. When acquiescence affects only the public fisc (when, for example, the IRS accepts a decision that reduces collections), the agency's decision is dispositive; it is an exercise of the President's power to execute the laws. When private rights exist on both sides, the agency's decision one way or the other on acquiescence is contestable in order to hold the balance true among the private interests.

Whenever this court decides whether to create a conflict among the circuits, it makes a decision about the benefits of uniformity versus accuracy no different in principal or effect from the decision the FRA made about the Hours of Service Act. When the Supreme Court decides to let a conflict simmer, or to grant plenary review, it makes a similar decision. Nationwide implementation of the decision of the first circuit to encounter a question is not, therefore, the sort of executive prerogative to which a court owes the respect that it must accord the executive's decision about sound administration of the law. It is a subject on which judges are free to exercise their own judgment, when a party aggrieved by the agency's decision complains. I therefore agree with my colleagues that we need not "defer" to the FRA's acquiescence position. We ought, however, to grant some persuasive force to its consistent view of the meaning of the law. This brings us out in the same place, and, with a few exceptions, for the same reasons. I therefore join not only the court's judgment but also its opinion, except for the discussion of deference at pages 6-10.

A true Copy:
Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 93-1505, 93-2378, and 93-2712

THE ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY, BURLINGTON NORTHERN RAILROAD COMPANY, CONSOLIDATED RAIL CORPORATION, CSX TRANSPORTATION, INC., ILLINOIS CENTRAL RAILROAD COMPANY, NORFOLK SOUTHERN RAILWAY COMPANY, NORFOLK & WESTERN RAILWAY COMPANY, SOUTHERN PACIFIC TRANSPORTATION COMPANY, and UNION PACIFIC RAILROAD COMPANY,
Petitioners,

v.

FEDERICO PENA, Secretary of Transportation, *et al.*,
Respondents,

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, and UNITED TRANSPORTATION UNION,
Intervening Respondents.

On Petitions for Review of Orders of the Federal Railroad Administration

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ARGUED FEBRUARY 22, 1994—DECIDED JULY 13, 1994

Before BAUER and MANION, *Circuit Judges*, and GILBERT, *Chief District Judge.**

GILBERT, *Chief District Judge*. The petitioners bring this petition for review of orders of the Federal Railroad Administration (the "FRA") changing its interpretation

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* Judge J. Phil Gilbert, Chief District Judge from the Southern District of Illinois, is sitting by designation.

of the Hours of Service Act, 45 U.S.C. §§ 61-66 (the "HSA" or the "Act"), to provide that time spent waiting by a train crew, which has been relieved from all train operating duties, for transportation back to its point of release is now "on duty" time to be counted toward the maximum 12 consecutive hours on duty allowed by the HSA. For the reasons given below, we grant the petition and affirm the agency's decision.

As a preliminary matter, we must determine whether we have jurisdiction over this matter. Pursuant to 28 U.S.C. § 2342(7) the court of appeals (other than the U.S. Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, among others, all final agency actions described in section 202(f) of the Federal Railroad Safety Act of 1970 [45 U.S.C. § 431(f)]. The Federal Railroad Safety Act provides that "The Secretary of Transportation . . . shall (1) prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety. . . ." 45 U.S.C. § 431(a). The Secretary of Transportation is charged with administration of the Hours of Service Act. 49 U.S.C. § 1655(e)(2). The Secretary has delegated this function to the FRA, a federal agency within the Department of Transportation. The Federal Railroad Safety Act also provides:

> Any final agency action taken by the Secretary under this subchapter or under any of the other Federal railroad safety laws, . . . is subject to judicial review as provided in chapter 7 of Title 5. Except as provided in section 432(e) of this title, any proceeding to review such final agency action shall be brought in the appropriate court of appeals as provided by and in the manner prescribed in chapter 158 of Title 28.

45 U.S.C. § 431(f). Accordingly, we find that we do have jurisdiction to consider this petition.

I. Background

The HSA regulates the maximum hours of service that a train crew can be continuously on duty. The Act currently allows railroads to operate crews up to a maximum of 12 consecutive hours. The HSA also imposes mandatory rest periods before employees involved in train operation can be recalled to work. An employee who has been continuously on duty for the maximum 12 hours cannot go on duty again until he or she has had at least 10 consecutive hours off duty. In addition, an employee cannot return to duty unless he or she has had at least 8 consecutive hours off duty during the preceding 24 hours.

When a train crew cannot reach its destination within the maximum 12 hour period, the railroad must order the crew to "park" the train and await transportation back to the crew's designated terminal release point. When the crew reaches this maximum 12 hour limit it is said to be an "expired" or "outlawed" crew. The time spent in "deadhead" transportation to its designated release point is "limbo" time, because it is not on-duty time for purposes of the 12 hour maximum, nor is it off-duty for purposes of the mandatory rest periods. This limbo time is specifically excluded from time off duty in the statutory language, just as deadhead transportation *to* the crew's beginning point *is* on duty time. The question is, what about time spent waiting for the deadhead transportation back to the point of release?

The FRA had previously interpreted the 1969 amendment to the HSA, which cut the maximum hours from 16 to 12 and added the language about deadhead transportation, to mean that time spent by an "outlawed" or "expired" crew waiting for deadhead transportation to its designated release terminal was *not considered on-duty time*. The FRA treated this waiting time as part of the transportation and therefore limbo time.

The Ninth Circuit Court of Appeals rejected the FRA's interpretation in *United Transportation Union v. Skinner*, 975 F.2d 1421 (9th Cir. 1992). The Ninth Circuit held that such time spent waiting for deadhead transportation must be counted as *time on duty* for purposes of the 12 hour maximum. The Ninth Circuit said, "based on the language of the HSA and on its consistent interpretation by the courts throughout its 85-year history, we conclude that such waiting time is and always has been time on duty for purposes of the statute." *Id.* at 1422.[1] The FRA then decided to adopt this interpretation of the HSA nationwide, even though the FRA had opposed the interpretation in the Ninth Circuit. It is this decision of the FRA that the petitioners challenge.

II. Analysis

A. Standard

When we review an agency interpretation we must follow the two-step analysis mandated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82 (1984): (1) first, the court must consider whether Congress has spoken directly to the identical question at issue, for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress; (2) if the statute is silent or ambiguous with respect to the specific issue the court must consider whether the agency's interpretation is a reasonable one.

B. Discussion

The HSA defines time "on duty" as follows:

> Time on duty shall commence when an employee reports for duty and terminate when the employee is finally released from duty, and shall include:

[1] There has been only one prior reported decision holding that time waiting for deadhead transportation is on duty time. *United States v. Pennsylvania RR Co.*, 275 F.Supp. 345 (W.D.Pa. 1967).

> (A) Interim periods available for rest at other than a designated terminal;
>
> (B) Interim periods available for less than four hours rest at a designated terminal;
>
> (C) Time spent in deadhead transportation by an employee to a duty assignment: *Provided*, that time spent in deadhead transportation by an employee from duty to his point of final release shall not be counted in computing time off duty;
>
> (D) The time an employee is actually engaged in or connected with the movement of any train; and
>
> (E) Such period of time as is otherwise provided by this chapter.

45 U.S.C. § 62(b)(3).

In determining whether the interpretation adopted by the FRA is the proper one, we first consider "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, at 842-43, 104 S.Ct. at 2781-82. On the other hand, "if the statute is silent or ambiguous with respect to the specific issue," the court must consider whether the agency's interpretation is a reasonable one. *Id.* at 843.

The statute is clearly "silent or ambiguous" with respect to the question of whether time waiting for deadhead transportation is on-duty time, limbo time, or off-duty time. So we must consider whether the agency's interpretation is "a reasonable one." In order to make that determination we must consider whether the agency's interpretation "is based on a permissible construction of the statute." *Id.* If the answer is yes, then the Court must defer to the interpretation advanced by the agency

charged with administering the statute. *Id.* We would have to reject any administrative construction which is contrary to clear congressional intent. We are not, however, required to agree completely with the construction put forward by the agency. *Chevron* tells us that we do not have to find the agency's interpretation is the only one it could have adopted, nor does it have to be the interpretation we would have reached if the question initially arose in a judicial proceeding. *Id.* at 843, n.11. Had this question come before us originally we would have been inclined to draw a bright line at a different point in time, that is, at the time the relief crew took over operation of the train and the "expired" crew was therefore relieved of all operating duties. But that interpretation is not the one reached by the Ninth Circuit and not the one adopted by the FRA.

Because we conclude that the language of the HSA does not definitively answer the question regarding the proper characterization of waiting time, we next consider whether the FRA's interpretation "is based on a permissible construction of the statute." *Id.* If so, we are required to defer to the interpretation advanced by the agency charged with administering the statute. *Id.* at 844.

We find that the interpretation advanced by the FRA, in reliance on the Ninth Circuit opinion, is reasonable and based upon a permissible construction of the HSA. Indeed, we would be hard pressed to say that an agency's reliance upon the opinion of a Circuit Court of Appeals is unreasonable.

III. Conclusion

In accordance with the foregoing, we affirm the Federal Railroad Administration's order interpreting the Hours of Service Act to provide that time spent waiting by a train crew for transportation to its point of release is "on duty" time to be counted toward the maximum 12 consecutive hours on duty allowed by the Hours of Service Act.

BAUER, *Circuit Judge*, dissenting: I respectfully dissent. I do not believe the agency's interpretation of the statute is reasonable. "The purpose of the Act is to promote safety in operating trains by preventing the excessive mental and physical strain which usually results from remaining too long at an exacting task." *Chicago & A.R. Co. v. United States*, 247 U.S. 197, 199 (1918). The majority's interpretation of the Act impedes the efficiency of railroads and does nothing to advance the purpose of the Act.

Evidence was presented at the congressional hearings regarding the 1969 amendments to the Act that time spent waiting for deadhead transportation was not on-duty time. Further, the Senate Report of the amendments states that on-duty time was "time spent actually engaged in or connected to the movement of the train." S. Rep. No. 91-604, 91st Cong., 1st Sess. 8 (1969). This comports with the purpose of the act; the hazards of train operation occur when the train is moving.

Two specific aspects of the 1969 amendments to the Act serve to illuminate this determination. Time spent by an employee in deadhead transportation to begin a shift was categorized as time on-duty because this time could not be spent resting and thereby impacted the employee's physical and mental condition when operating a train at the end of a shift. Time spent by an employee in deadhead transportation after a shift, however, was categorized as limbo time because it neither effected the employee's ability to operate a train nor provided an opportunity for adequate rest. Time spent waiting for deadhead transportation is analogous to the latter and should be considered limbo time.

The majority affirms the FRA's interpretation solely on the basis of its reliance on the Ninth Circuit's opinion in *United Transp. Union v. Skinner*, 975 F.2d 1421 (9th Cir. 1992). But I believe *Skinner* is based on a faulty premise: that railroad crews waiting for deadhead transportation might be expected to perform additional duties

to further the completion of their assigned train's run. The cases cited by *Skinner*, 975 F.2d at 1426, address the categorization of time spent by a railroad crew waiting for repairs to be made or for some other delay before resuming its duties of operating the train; these cases held that the crews were on duty during the time they spent waiting. That reasoning makes sense considering the Act's goal of ensuring safety in the course of operating trains.

Outlawed crews waiting for deadhead transportation, however, have no further duties connected with *operating* the train. To the extent the outlawed crew remains on the train while it waits, it may be responsible for ensuring that the train is not looted or otherwise vandalized. But an outlawed crew is precluded from operating the train, technically by the statute and practically by the railroad. It is not unusual, though, for the outlawed crew to depart the train to wait nearby for deadhead transportation after a relief crew has arrived and assumed control of the train in order to bring the train to its destination. The interpretation of the Act by the majority, following *Skinner*, would include as on-duty time that time an outlawed crew spends in a saloon waiting for deadhead transportation, an activity that hardly contributes to the "excessive mental and physical strain" while engaged in or connected to the movement of a train. This interpretation is considerably removed from the statutory goal of safety in operating trains and is, in my opinion, unreasonable in light of the letter and spirit of the Act.

A true Copy:
Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX C

[DoT Logo]

U.S. Department
of Transportation

Federal Railroad
Administration

Washington, D.C. 20590
400 Seventh St., S.W.

BY HAND

Robert W. Blanchette, Esq.
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Dear Mr. Blanchette:

As you are aware, on December 29, 1994, the United States Court of Appeals for the Seventh Circuit issued a decision in the case of *Atchison, Topeka, and Santa Fe Railway Co.* v. *Peña* (Nos. 93-1505, 93-2378, and 93-2712) (*en banc*).[1] This case concerns the Federal Railroad Administration's (FRA) interpretation of the Federal hours of service laws as they pertain to the status of train crewmembers waiting for the arrival of deadhead transportation to their point of final release. In response to the legal challenges filed in 1993 by nine major railroads, the Seventh Circuit Court of Appeals, sitting *en banc*, ruled unanimously against FRA and held that time spent waiting for transportation to a designated terminal by a train crew that has been relieved of all operating duties of the train to which it is assigned is *not* time on duty, but rather "limbo time" (*i.e.*, neither on- nor off-duty time). Slip opinion at page 13.

The Seventh Circuit's holding coincided with the position that FRA had traditionally taken until the agency

[1] The Seventh Circuit is comprised of Illinois, Indiana, and Wisconsin.

changed its interpretation in late 1992. Prior to that change, FRA had considered an employee to be on duty during the time spent waiting for the arrival of the deadhead vehicle *only* if the employee actually had duties to perform. If the railroad had relieved the employee of all responsibility, FRA had considered such time spent merely waiting for the deadhead vehicle to arrive as limbo time for hours of service purposes.

However, on September 22, 1992, in response to lawsuits filed by the United Transportation Union and the Brotherhood of Locomotive Engineers, a three-judge panel of the United States Court of Appeals for the Ninth Circuit held that such time spent waiting for transportation is to be considered on-duty time. *United Transportation Union* v. *Skinner*, 975 F.2d 1421 (9th Cir. 1992).[2] Although FRA disagreed with the Ninth Circuit's legal rationale, FRA recognized both the ambiguity of the Federal hours of service laws' pertinent provisions and the reasonableness of the court's ultimate conclusion as to the proper reading of those provisions. Accordingly, in the interest of uniform application of the Federal hours of service laws and to promote the safety of railroad operations, FRA decided to treat the Ninth Circuit's opinion as binding throughout the entire nation.

FRA has always believed that both the Ninth Circuit's interpretation of the relevant hours of service provisions, and what became the Seventh Circuit's interpretation, were reasonable. While FRA adopted the Ninth Circuit's interpretation primarily to achieve national uniformity, the decision of the Seventh Circuit has now made this goal impossible to achieve unless and until the United States Supreme Court resolves the split between the circuit courts. Moreover, upon review of the Seventh Circuit's unanimous, *en banc* decision, FRA concludes that

[2] The Ninth Circuit, of course, includes Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

the Seventh Circuit's reading of the pertinent hours of service provisions is better reasoned than the decision of the Ninth Circuit.

Accordingly, FRA has decided to adopt the Seventh Circuit's decision as its own view in every state in the nation located outside of the jurisdiction of the Seventh and Ninth Circuits, beginning at 12:01 a.m. on March 6, 1995.[3] FRA has chosen March 6 because it will allow sufficient time for FRA to notify its field inspectors and the regulated community of FRA's revised interpretation. FRA also believes that by selecting one uniform date for the remaining implementation of its revised interpretation the impact on both FRA and the regulated community will be kept to a minimum.

This means that *effective on March 6*, FRA will treat an employee merely required to remain on a train (at a location outside of the territory of the Ninth Circuit), while awaiting the arrival of deadhead transportation to a point of final release, as neither on nor off duty; the employee's status most closely resembles, and is part and parcel of, deadheading from duty. However, as FRA stressed in its August 4, 1989 letter (copy enclosed) to Mr. Lawrence Mann, counsel for the rail labor unions, if an employee is required to perform service of any kind during that period (*e.g.*, protecting the train against vandalism, observing passing trains for any defects or unsafe conditions, flogging, shutting down locomotives or checking fluid levels, or communicating train consist information via radio), he or she will be considered as on duty until all such service is completed. The Seventh Circuit's holding did not address the situation in which a crew that has expired under the Federal hours of service laws is called upon to perform nonoperational duties (*i.e.*, commingled duties) while it waits for the arrival of the

[3] However, since the Seventh Circuit issued the mandate in its decision on February 27, 1995, *see* Fed. R. App. P. 41, FRA began applying the revised interpretation inside the jurisdiction of the Seventh Circuit effective at 12:01 a.m. on that date.

deadhead vehicle after the expiration of the maximum 12 hours. However, in a footnote, the court made clear that "the statute accounts for that circumstance" by treating such time as time on duty. Slip opinion at page 10, footnote 4; *see* 49 U.S.C. § 21103. Of course, where a railroad's operating rules clearly relieve employees of all duties during the waiting period and no duties are specifically assigned, the waiting time will be considered limbo time.

Although it is FRA's expectation that the split between the Ninth and Seventh Circuits concerning their differing interpretations of the Federal hours of service laws will eventually be resolved by the United States Supreme Court, pending such resolution, FRA will, out of deference to the court of jurisdiction, continue to treat time spent merely waiting for the arrival of deadhead transportation to the point of final release as time on duty *when it occurs within the territory of the Ninth Circuit*. FRA will therefore expect affected railroads to record such time as time on duty and file reports of excess service, as necessary, under 49 C.F.R. Part 228.[4]

FRA has long been concerned about instances in which employees are held on trains for several hours while awaiting the arrival of deadhead transportation in the absence of any valid emergency that might explain such an occurrence. To the extent that the waiting periods are extremely lengthy, current scientific information concerning sleep cycles and the effects of fatigue on safety-sensitive performance indicates that the waiting periods could contribute to the cumulative exhaustion of the employee. This cumulative exhaustion could occur even though the employee receives the legally required rest period upon arrival at the point of final release.

[4] **Although time spent awaiting the arrival of deadhead transportation will still constitute time on duty within the territory of the Ninth Circuit, FRA will continue to exercise its prosecutorial discretion in deciding which cases warrant civil penalties.**

Accordingly, it is FRA's expectation that the railroads will voluntarily employ their best efforts to minimize the time that employees spend waiting for the arrival of deadhead transportation throughout the remainder of the United States.

We would appreciate your making this letter known to your member railroads. In due course, we will amend Appendix A to 49 C.F.R. Part 228 in accordance with the views stated herein.

Sincerely,

/s/ S. Mark Lindsey
S. MARK LINDSEY
Chief Counsel

Enclosure

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[DoT Logo]

U.S. Department
of Transportation

Federal Railroad
Administration

400 Seventh St., S.W.
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[Aug. 4, 1989]

Lawrence M. Mann, Esq.
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Dear Mr. Mann:

This is in response to your letters to Associate Administrator Joseph W. Walsh concerning FRA's interpretation of the Hours of Service Act as it applies to certain questions you have posed. I note at the outset that, like your questions, my responses are general in nature. Thus, this response should not be read as covering every factual variant that may arise. This letter does not concern the issue of duty calls to employees during off-duty periods. That issue is being addressed in a separate letter.

Remaining On A Train After Expiration of Twelve Hours On Duty

Most of your questions concern how the Act applies to employees who are required by railroads to remain on a train after having been on duty for 12 continuous hours. Under the Act, the time of an employee engaged in train and engine service falls within one of three categories: (1) on-duty time is time between reporting for duty and final release from duty (except time spent deadheading from duty) and includes time spent actually providing service to the railroad, whether in covered service or in commingled service, and time spent deadheading

to duty; (2) off-duty time is time actually available for rest, *i.e.*, time coming after the final release from duty, including time spent commuting to and from the employee's regular reporting point; and (3) time spent deadheading from duty to the point of final release ("limbo time"), which as provided in section 1(b)(3) of the Act, is neither time on duty nor time off duty.

Generally, an employee required to remain on a train while awaiting deadhead transportation to a point of final release is neither on nor off duty; he or she is in a situation that most closely resembles, and is part and parcel of, deadheading from duty. However, if an employee is required to perform service of any kind during that period, he or she is on duty until all such service is completed. Thus, the question in each case is whether the employee was required or permitted to provide any actual service to the railroad during the time spent awaiting deadhead transportation.

We are aware of case law suggesting that employees are on duty while awaiting the arrival of a relief crew even if they perform no duties for the railroad during that period. *E.g., Missouri, K. and T. Ry.* v. *United States*, 231 U.S. 112 (1913); and *United States* v. *Pennsylvania R.R.*, 275 F.Supp. 345 (W.D. Pa. 1967). However, those cases are distinguishable on their facts and/or no longer good law in light of the 1969 amendments to the Act. In *Missouri*, the Supreme Court rejected the railroad's argument that the train crew was not on duty during a period in which the "engine was sent off for water and repairs." 231 U.S. at 119. The Court concluded that the employees were "none the less on duty when inactive. Their duty was to stand and wait." *Id.* Thus, the case involved a crew's waiting for an engine to be ready after reporting for duty, a situation that FRA would clearly consider to be time on duty. Although its language is broad, *Missouri* simply does not address the status of a crew that is not performing service while

awaiting deadhead transportation. In fact, the year after *Misouri* was decided, an appellate court distinguished crew members "released from any and every duty in connection with the movement of the [train], and retired to rest upon the train," from a fireman called upon to serve as an engine watchman; only the fireman was considered to have been on duty. *Great Northern Ry. v. United States*, 211 F. 309, 311 (9th Cir. 1914).

In *Pennsylvania*, a district court relied on *Missouri* in holding that crew members awaiting deadhead transportation were on duty despite the facts that the railroad had expressly relieved them of responsibility at the expiration of their maximum legal duty period and they had performed no subsequent duties. In addition to being an overly broad extension of *Missouri*, this case is simply no longer on point in light of the 1969 amendments to the Act. Those amendments added, *inter alia*, a definition (at section 1(b)(3)(C)) of "time on duty" that includes time spent deadheading to duty but excludes, from both time on duty and time off duty, time spent by an employee in deadhead transportation "from duty to his point of final release." Thus, for the first time, the Act itself recognized that an employee's time may fall between the on-duty and off-duty categories and that not all time between reporting for duty and the final release is time on duty. It is important to note that, as originally introduced, both bills from which these amendments arose (H.R. 8449 and S. 1938) would have counted all deadhead time (to or from duty) as time on duty. However, Congress recognized that, provided the employee is given the required 8 or 10 hours off duty after final release, there is no safety detriment caused by treating deadheading time as neither on nor off duty. Accordingly, because the premise of *Pennsylvania, i.e.*, that all time between reporting for duty and final release is time on duty, was removed by the 1969 amendments, that case no longer provides useful guidance as to the current requirements of the Act.

There is every reason to believe that Congress intended to include time spent awaiting deadhead transportation to the point of final release as part of the deadheading itself. Identical logic supports considering the two periods (awaiting deadhead and deadheading itself) as limbo time. Neither period is truly available for rest, so it cannot be considered time off duty. Nor is either period one in which actual service (covered or commingled) is performed, so there is no safety rationale for considering it time on duty. Moreover, if either period were considered time on duty, the railroads would have no incentive to cease the performance of all duties at the conclusion of the maximum on-duty period. That is, if the railroad would be subject to the same penalty for tying up the crew as it would be if it required the crew to continue in service, one might expect some railroads to simply keep the train moving to the point of final release under the control of employees who had already worked for 12 hours. We believe it is far safer, and more consistent with the intent of Congress, to give the railroad the incentive to relieve the employees of all duties by considering both time awaiting deadhead transportation and time spent deadheading to the final release point as limbo time. That way, the railroad has not committed a safety violation, safety itself is not impaired, and the statutory off-duty period is not encroached upon by periods that are not available for rest.

Performing Service While Awaiting Deadhead Transportation

The situation we have discussed above concerns employees in a status that some railroads describe as "relieved, but not released." There, employees are required to stay on their train to await transportation to the point of final release, but are expressly relieved of any duties. However, in some situations the railroad tells the crew to tie up but subsequently requires one or more members

to perform service. Any employee required or permitted to perform such duties would, of course, be on duty until all such duties were completed.

The analysis is easy where the railroad's representative expressly states, when ordering the crew to tie up or thereafter, that certain duties must be performed. It is also easy to analyze the opposite situation, *i.e.*, where the railroad representative expressly relieves the crew of all duties and merely requires them to stay with their train until deadhead transportation arrives.

But difficult questions arise where the dispatcher or other railroad official in charge is not so explicit. If, for example, a dispatcher merely tells the crew members to put their train in a siding and does not tell them they are relieved from duty, and the railroad's operating rules impose general duties such as observing passing trains or protecting the train from vandalism, the employees may not be relieved from duty. These difficult cases will require an examination of the particular railroad's practice concerning how crews are relieved from duty. On one railroad the practice may also be to simply tell the crew to tie up, which carries the message that the employees are—unless specifically ordered to perform a particular duty—completely relieved from duty and must merely await transportation. In fact, a railroad may have a standing policy that employees must relieve themselves from duty prior to exceeding their limit of duty hours, so that no specific order to that effect is necessary. On a different railroad, the practice may be that employees are not relieved from general duties such as observing passing trains unless an explicit order relieving them from duty is received.

Thus, sorting out these cases requires knowledge of specific facts from which FRA can determine whether the employees have been relieved of duties or not. If the order or message they receive is not explicit and the railroad has no standing instructions on how to construe

an order to tie up the train, FRA may have to consult the railroad's rules to find out what duties the employees might reasonably have been expected to perform, in the absence of specific orders, while awaiting transportation.

Aside from the question of whether the railroad required or permitted certain service, there is the question of what constitutes service. You list the following possible duties in your letters of August 17 and August 26, 1988:

- protecting the train against vandalism
- observing passing trains for any defects or unsafe condition
- flagging
- shutting down locomotives or checking fluid levels
- communicating train consist information via radio
- being "responsible for handling any issue which might arise while the train is not moving"
- doing paperwork
- monitoring engine radios

The fiirst five of these items clearly constitute duty if required or permitted by the railroad, but the last three beg the question of whether they actually and under all circumstances constitute duty. First, "being responsible for handling any issue which might arise" is vague. If the railroad had issued an order to that effect, that fact would probably be inconsistent with a conclusion that the railroad intended that the employee be relieved of all duties. If, however, the railroad had clearly relieved the employee but noted that he or she may be put back on duty should the need arise while awaiting the deadhead transportation, the employee would not be on duty again unless subsequently told to handle an issue that had arisen.

Second, "doing paperwork" when required or permitted to do so by the railroad is time on duty in commingled service. However, merely signing time returns, which ordinarily takes no more than a minute and occurs when the crew has reached its lodging and is about to begin its rest, is so minimal that it should not be considered as time spent doing paperwork.

Third, "monitoring engine radios" when required or permitted by the railroad to do so is time on duty for an employee given that responsibility, but does not include use of the radio initiated by the train crew to attend to such incidental matters as calling a van driver to give the train's location or ascertain how long a wait the crew will have before being picked up. Nor would an employee who chose to listen to radio transmissions after having been relieved of any responsibility to do so be considered as on duty.

I might also note that, in addition to having to determine whether an activity constituted service and was required or permitted by the railroad, FRA must also weigh the likely compliance impact and litigation risks in deciding whether to assess penalties.

You point out that there have been unspecified situations in which time spent awaiting deadhead transportation has been counted toward the required off-duty period. Time off duty begins at the point of final release, not while the employees are sitting on their train. FRA has permitted one very limited exception as a practical matter: if the time between being relieved of duty and arriving at an away-from-home lodging is 30 minutes or less, such a period can be included in time off duty. Our rationale is that, just as time off duty at a home terminal includes commuting time, so time off duty at an away-from-home terminal may include a reasonable allowance (30 minutes) for commuting. However, if the crew is not at the lodging within 30 minutes of being relieved from duty, the allowance is lost and the whole

period (awaiting deadhead and being deadheaded) is limbo time. This policy gives the railroads the incentive to get the employees off the train and to the lodging quickly, which seems to be a purpose you share.

You also claim that crews have been required to stay on their trains as long as 9 hours awaiting transportation. As long as no duties are performed and the full off-duty period is given once the crew arrives at the lodging, these situations are not violations of the Act. Nevertheless, except in the most extreme emergency, such situations are outrageous. I can only point out that, if FRA had substantive regulatory authority in the hours of service area, a regulation could be written to address that issue. For example, a rational rule might extend the required off-duty period by an hour for any hour spent awaiting transportation. Such a rule would discourage the practice that concerns you and possibly increase safety. However, the rigidity of the Act precludes our even considering such a rule.

Very truly yours,

/s/ Gregory B. McBride
GREGORY B. MCBRIDE
Assistant Chief Counsel
for Safety

cc: Hollis Duensing, AAR
Howard Croft, ASLRA

bcc: RRS-1, 10
All regional directors
file (HS Act—general)